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March 2, 2006

Ms. Marlene H. Dortch
Commission's Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Reply Comment from ClearLinx Network Corporation, LLC
RM 11303

Dear Ms. Dortch:

Please find enclosed a **copy** of the Reply Comment concerning the Petition for Rulemaking of Fibertech Networks, LLC (RM-11303) filed by ClearLinx Network Corporation, LLC. ClearLinx has filed an original with the FCC using the Commission's Electronic Comment Filing System.

If you have any questions, please do not hesitate to give me a call.

Sincerely yours,

Sarah E. Lent

Enclosure

cc: Chairman Kevin J. Martin (w/ encl)
Commissioner Michael J. Copps (w/ encl)
Commissioner Jonathan S. Adelstein (w/ encl)
Commissioner Deborah Tate (w/ encl)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Rulemaking of Fibertech Networks LLC	RM-11303

REPLY COMMENTS OF CLEARLINX NETWORK CORPORATION, LLC

Pursuant to the Order released on January 10, 2006, in which the Commission extended the deadline for the submission of Reply Comments in the above-referenced proceeding, ClearLinx Network Corporation, LLC ("ClearLinx") submits these Reply Comments in support of the Petition for Rulemaking filed by Fibertech Networks, LLC ("Fibertech")[1]. ClearLinx supports Fibertech's request for a rulemaking to adopt standards and practices for pole attachments.

ClearLinx joins several other parties, including Virtual Hipster Corporation and NextG Networks, Inc., in urging the Commission to address issues affecting the rates, terms and conditions applicable to wireless facility attachments to utility-owned poles as well as establishing time limits for pole owners to respond to requests for wireline attachments, wireless equipment attachments, make ready engineering and make ready construction. Currently, a number of electric utility pole owners in several states have: (i) denied ClearLinx any access to pole attachment agreements, (ii) imposed discriminatory

[1] *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC,* Petition for Rulemaking of Fibertech Networks, RM-11303 (filed December 3, 2005) (the "Petition").

rules and costly fees with regards to the node equipment attachments, and (iii) applied attachment fees that far exceed the charges resulting from the Commission's pole rate formula. These practices, taken individually or collectively, constitute unreasonable and anti-competitive barriers to entry into the marketplace, restrict our ability to trade, and frustrate the purposes underlying the Federal Pole Attachment statute. The Commission must take action in order to reaffirm and further clarify the attachment rights of all service providers employing wireless technologies. This action is needed in order to cure existing abuses by pole owners and promote the continued deployment of high quality, broadband capable wireless facilities throughout the country.

I. Introduction and Summary

Description of ClearLinx's Facilities

ClearLinx is a provider of "open" networks for the wireless industry that are based upon a Distributed Antenna System ("DAS") architecture. ClearLinx deploys open networks to help multiple Wireless Service Providers ("WSP") improve coverage and capacity while also meeting community concerns regarding the aesthetic impact of traditional wireless network infrastructure, such as the towers, rooftop antennas and the mono-pole construction methods. Open network architectures are typically deployed where there are "holes" or "deadspots" in cellular and/or PCS wireless signal coverage, where existing wireless networks require additional capacity, and in those areas that are too costly or difficult to implement using the traditional deployment methods. ClearLinx's DAS facilities consist of three components which are impacted by the utilities. First, antennas are mounted on the top of utility poles. Second, fiber optic cables run from the antennas to a ClearLinx Base Transceiver Station (BTS) Hub facility

and the Node Equipment and peripherals which convert optical signals to RF and RF signals to optical signals bi-directionally. The fiber optic cable is installed aerially in the communications space on the utility distribution poles, utilizing leased conduit and duct and, where necessary, placed underground using traditional methods. The ClearLinx BTS Hub facility is interconnected to the WSP equipment and facilities. The Node Equipment and peripherals consist of a small pole-mounted enclosure that houses the radio frequency amplifiers that drive the antennas. Third, the network requires commercial electric service to power each Node.

Access to Existing Infrastructure

The DAS technologies and capabilities were borne out of the need to provide next-generation broadband wireless services while minimizing the challenges faced with local zoning, siting, permitting and construction of antenna towers. The use of the existing utility infrastructure eliminates one of the primary obstacles to providing ubiquitous coverage. ClearLinx's open networks allow WSPs to provide robust cellular signals, with consistent and clear wireless coverage, and address deficient cellular and PCS wireless coverage in some geographical areas.

The implementation of the DAS network requires reasonable and timely access to public rights-of-way and to the existing utility pole distribution system infrastructure. Based upon ClearLinx's experience in dealing with electric utility companies in a number of states, many electric utilities have made it their standard practice to: (i) delay access to attachment agreements and refuse to negotiate pole attachment agreements in good faith, (ii) prohibit the installation of any antennas at the top of the pole by developing and adopting internal rules and standards, in excess of established federal and state rules, that

effectively eliminate wireless carriers from using the majority of existing infrastructure, (iii) impose unreasonable and discriminatory attachment conditions, (iv) charge excessive pole attachment rates for node equipment, and (v) require security deposits, surety bonds or letters of credit that, when combined with the requirements of the joint pole owner, amount to excessive surety demands for the right to attach to a pole.

Consequently, the initiation of a rulemaking by the Commission is needed to reaffirm and clarify the rights of telecommunications service providers using wireless technologies to attach to poles, including at pole tops, under reasonable rates, terms and conditions.

II. Fibertech's Petition Raises Issues Which Should Be Addressed By The Commission

A. Support for Rulemaking Proceedings: ClearLinx supports the initiation of a rulemaking, as requested by Fibertech, to consider the adoption of standards and practices that would remove anti-competitive obstacles and unreasonable delays from the pole attachment process. Based upon ClearLinx's experience in dealing with many pole owners in different states, reasonable efforts to negotiate with a number of pole owners have been futile. Several electric utilities have claimed that they do not have any form of wireline or wireless equipment attachment agreements. Other utilities have adopted practices that have resulted in improper denials of access, developed discriminatory attachment rules and standards that make attachment commercially impracticable, and have imposed attachment fees that deviate significantly from the Commission's formula.[2]

[2] The impropriety of these practices of some electric utility pole owners is also borne out by the fact that other electric utility pole owners have acted more reasonably by allowing access to pole tops and not discriminating against ClearLinx in terms of its placement of other facilities, such as power supplies, and

Commission action and continued oversight is therefore needed to: (i) enable prospective attaching parties to deploy their facilities in an efficient, timely and economical manner, without being burdened by costly, lengthy and unproductive negotiations with recalcitrant pole owners, and (ii) ensure that rulemaking at the Federal level is in place to guarantee that rules adopted by the utility under the guise of safety are reasonable and not intended for exclusionary purposes due to competitive concerns originating with the utilities' own communications services affiliates.

B. Specific Instances: ClearLinx has encountered some electric utility pole owners that forbid any pole top attachments, citing safety considerations, while others have created local rules for antennas placed in the communications zone by increasing the spacing requirements from the antenna systems to the secondary power lines, effectively eliminating large percentages of otherwise usable distribution poles. For example, in Massachusetts while one electric utility allowed and encouraged pole top attachments, another electric utility imposed a blanket prohibition against any pole top attachments citing safety as it relates to its internal policy standards. This same utility offered to sink a separate pole or have ClearLinx use substation facilities that may be in the vicinity for its attachments. Both options, however, require ClearLinx to assume significant additional costs and time associated with the project schedule. ClearLinx has encountered this same problem of denial of pole top access in other states such as Connecticut, Florida and California.

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applying FCC formula-based rates to ClearLinx attachments (with appropriate adjustments for the number of feet occupied by the given attachments).

C. **Safety Concerns**: The electric utilities in California exempt their own wireless antennas on poles from the restrictions imposed on wireless service providers[3] even though such antennas can emit similar levels of RF emissions as the type of antenna deployed by wireless carriers. Any safety issue posed by RF emissions from wireless antennas can be addressed from an operational perspective. For example, a worker can address safety issues by notifying the WSP and requesting the WSP remotely disable or turn off the wireless antenna to avoid RF exposure if he or she needed to work in an area near the antenna. Further, the FCC has developed an extensive set of guidelines regarding occupational RF exposure limits for workers. Those guidelines allow several means for controlling exposure to RF emissions, including signage, installing physical barriers, moving in and out of an area (time averaging), and/or use of monitoring devices.[4]

The electric utilities' discriminatory double standard regarding wireless carriers' antennas is unreasonable and calls into question the electric utilities true motive (many of which have communications units) in restricting access to utility poles by wireless carriers.

Utility claims that RF emissions could pose a safety hazard have not been substantiated and do not justify a blanket ban on pole top antenna attachments. This should be evident from the fact that the electric utilities deploy and use wireless technology for their own purposes (SCADA) and allow their communications affiliates

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[3] Testimony of Marcus Brock on behalf of Pacific Gas & Electric, California Public Utilities Commission Docket No. 05-02-023, "Order Instituting Rulemaking on General Orders 95 and 128", Sept. 26, 2005, at p. 8.

[4] Testimony of Raymond Fugurer of the Consumer Protection and Safety Division, California Public Utilities Commission Docket No. 05-02-023, "Order Instituting Rulemaking on General Orders 95 and 128", Sept. 27, 2005, at p. 9 (citing OET Bulletin 65, Edition 97-01, Aug. 1997).

and subsidiaries to attach with far fewer restrictions than other parties. Some companies that permit these types of pole top attachments engage in the same type of business and put their own antenna facilities on pole tops.[5] Finally, in many instances the utility workers are not properly trained on the effects of RF emissions, differences in antenna types,[6] or have determined that training was not necessary due to the low output power levels per existing FCC guidelines.

The Commission has recognized that a blanket denial of pole top access is unreasonable. Indeed, such a blanket ban is contrary to the Commission's 2004 Public Notice, in which it reaffirmed the obligations of pole owners to provide wireless telecommunications service providers with pole access.[7] Protecting worker safety is a legitimate and necessary concern, but it should not be used as a means to discriminate against wireless carriers.

D. Contract Negotiations and Installation Practices: Some electric utilities refuse to allow any attachments unless ClearLinx signs, in addition to the standard three-party license with the telephone company, a separate and inconsistent "addendum" with commercially impracticable rates and terms. In contrast, others only allow antennas to be placed upon poles, requiring all node and electrical equipment to be placed in "ground furniture" in the public right of way. Placing equipment in "ground furniture" could place pedestrians and the general public in close contact with energized equipment, which would not occur by allowing placement of all required facilities as

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[5] Many utilities allow placement of their antennas within 12" of the secondary power cables when others are being mandated to place their antennas anywhere from 40" to 72" away from the secondary.

[6] SCADA uses Yagi type antennas where the energized element is exposed as opposed to the typical WSP's enclosed element Omni or Panel Antennas where all exposed metallic elements are properly grounded and the energized elements are protected by the RF transparent shroud.

[7] Public Notice, *Wireless Telecommunications Bureau Reminds Utility Pole Owners of their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates,* (rel. December 23, 2004).

direct attachments on utility poles, where only trained utility personnel qualified to perform work would be exposed. In addition, the forced use of "ground furniture" (including meter pedestals) imposes significant land use, environmental and local permitting burdens as well as the additional burden of obtaining separate rights of way and use agreements. These extra burdens raise costs, create delays and preclude access if any necessary permits are denied.

In other instances, electric utility pole owners in Connecticut refuse to allow for the attachment of a meter and ancillary equipment to its pole. Instead, they require that ClearLinx place such equipment in a separate housing in the public right of way. Placing equipment in the public right of way causes substantial delay and expense for ClearLinx to obtain the necessary permits (e.g. encroachment, special use, right or way use, etc.) and environmental impact reports and reviews, and in many instances, requires a franchise with the municipality that owns or manages the right of way. Further, ClearLinx must pay for the cost of a separate pedestal facility to house the meter and other equipment. Such permitting is not a commercially practicable alternative. Moreover, it is blatantly discriminatory and anti-competitive in light of the fact that the same utility routinely places the same type of metering facilities on its poles.

Some electric utilities require that ClearLinx attach its antenna in the communications space on its poles. This requirement degrades service quality by reducing the effective range of each location, creates the need for more attachments than would otherwise be necessary if pole top antennas were allowed, artificially drives up costs, causes inconvenience to other entities and communications companies occupying

the communications space, and is far less aesthetically attractive than installations above the power grid.

The placement of antenna in the communications space is suboptimal in light of the technology deployed. As ClearLinx is forced further down the pole, the signal pattern becomes more constrained and additional antennas are required within a given service territory in order to achieve the necessary coverage. Forcing ClearLinx into the communications space also may cause unnecessary crowding on the pole where telephone and cable attachments are located and may necessitate more (and avoidable) pole changeouts. Placement of antenna in the communications space requires the installation of a crossarm that adds a physical as well as a visual burden to the existing infrastructure. In addition, ClearLinx has had several entities require the placement of multiple poles on either side of the pole they install for the antenna as well as the pole hosting the Node equipment. These burdensome and discriminatory requirements cause unnecessary make ready engineering work, make ready construction costs and make ready delays that would not be experienced if pole top attachments were permitted. These requirements do not represent the type of cost effective approach that the pole owner would employ for its own needs.

ClearLinx is dependent upon the use of existing utility poles and does not have a ready option of sinking its own poles in locations where the electric utility has denied access or sought to impose unreasonable preconditions for attachment. In fact, municipalities often disfavor the unnecessary proliferation of new utility poles in a given location, and regularly insist that pole owners remove "double-poling" situations that occur when the pole owners and attachers do not transfer their facilities to the new pole

within a reasonable time. Thus, municipalities generally require a new entrant to attach to existing poles wherever feasible.[8] Forcing ClearLinx to construct separate poles is economically inefficient for all parties because the pole owner and its ratepayers lose attachment revenues that would help offset costs and the new entrant must bear the entire cost of a new pole rather than a share of cost of an existing pole.

E. **Unacceptable Fees**: Apart from issues of physical access, ClearLinx also has encountered electric utilities in several states that demand node equipment attachment fees that dramatically exceed the rates generally applicable to attachments under tariff or the Commission's formula. For example, one electric utility pole owner demand $2500 per pole per year. Another electric utility pole owner demand $900 per pole per year and yet another demand $580 per pole per year. These fees are on top of costly one-time license application fees, make ready surveys, security and surety bonds, make ready engineering and construction work, and any other fees that must be paid to a joint pole owner for engineering and re-arrangements. The attachment fees far exceed the tariffed attachment rates that these same pole owners charge for their wireline attachments and ClearLinx urges the Commission to confirm that utilities must establish annual rates for node equipment on distribution poles that are calculated based upon the existing tariffed Commission formula for per foot of pole space used.

[8] This municipal preference is expressed in cable television licenses that typically specify that the cable operator will make an effort to attach to existing utility poles.

III. The Commission Should Reaffirm And Clarify The Rights Of Telecommunications Service Providers Using Wireless Technologies To Attach To Utility Poles On A Non-Discriminatory Basis, In Accordance With The Commission's Formula For Pole Attachments By Telecommunications Providers

A. The Commission Should Confirm The Attachment Rights Of Telecommunications Providers Using Wireless Technologies

It should be well-settled by now that the Commission is authorized to regulate, where necessary, the rates, terms and conditions applicable to the attachment of wireless technologies to utility poles.[9] However, given the fact that a number of electric utilities ignore their obligation to provide timely, non-discriminatory access to poles at reasonable rates,[10] the Commission should confirm and codify these obligations through a rulemaking.

B. The Commission Should Affirm That Its Pole Attachment Formula Applies To The Attachments Of Telecommunications Providers Using Wireless Technologies

The Commission should clarify through a rulemaking that wireless attachers may be charged annual attachment fees in addition to application, make ready engineering and make ready construction fees-based upon the Commission's established formula. The Commission's telecommunications formula would apply and the amount of space occupied by a given attachment and could be adjusted at the time of an application for any specific attachments that occupy more than one foot.[11]

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[9] National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002). Public Notice, *Wireless Telecommunications Bureau Reminds Utility Pole Owners of their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates,* (rel. December 23, 2004).

[10] *See, e.g.,* Comments of Virtual Hipster (January 30, 2006) at 8-13.

[11] *Id.*

C. The Commission Should Adopt Rules That Ensure Access To Pole Tops And Other Space On Poles On A Non-Discriminatory Basis

ClearLinx concurs with prior comments made to the Commission that it should adopt a specific and explicit rule establishing a presumption that pole top attachments for wireless devices of the character used by ClearLinx and other service providers are allowed.[12] This type of presumption should operate in much the same way as existing rules governing access to poles and the basis for denying access as to specific attachments. A blanket pole owner prohibition against pole top attachments should not be allowed. Similarly, the Commission should adopt a similar presumption permitting the installation of equipment in usable space that is very common today.[13]

IV. Conclusion

For the reasons above, and based upon the comments submitted in this matter by other parties, ClearLinx respectfully urges the Commission to institute a rulemaking proceeding in accordance with 47 C.F.R. §1.407 in order to address the issues raised by Fibertech, ClearLinx and Virtual Hipster and NextG.

Respectfully submitted,

CLEARLINX NETWORK CORPORATION, LLC

By its attorneys,

/s/ Alan D. Mandl

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March 1, 2006

[12] *See,* Comments of NextG Networks, Inc. (January 30, 2006) at 10-12.
[13] *Id.* at 13-14.